collect signatures on petitions. Accordingly attention should be focused on those who come onto the shopping center to shop as well as to receive the communications of others and to sign petitions. People have come to expect handbillers, petitioners, and picketers on shopping center premises. The record before this Court in *Homart Development Co. v. Diamond*, No. 1469 establishes that the late Senator Robert Kennedy, Congressman (now Senator) John Tunney, and Governor Ronald Reagan attempted to utilize the premises of Inland Center for political campaigning. The exercise of First Amendment rights on shopping centers and other similar types of property has in reality become a tradition in this country. A reversal of the decision of the Ninth Circuit in the instant case can only serve to destroy that tradition.

People's Lobby suggests as a rule that has long been law in this country: No one may disrupt or disturb any business activity. Various municipal ordinances describe in more detail the kind of conduct that would result in criminal prosecution. This rule would permit one or two petition carriers to go upon a shopping center mall but would deny those persons similar access to a restaurant, which also is open to the public. The reason is that one or two petition carriers do not disturb the business of a shopping center. The public is used to such activity at such locations. It is a part of America. On the other hand, it is not in keeping with the atmosphere or nature of a restaurant for persons to travel from table to table, disturbing the patrons.

This rule is better than the rule suggested by the America Retail Federation, which would open up a restaurant to First Amendment activity if it were situated on a highway with no other business establishments around.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-492

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

PETITIONER'S REPLY BRIEF

GEORGE BLACK, JR.
ROBERT J. MILLER
BLACK, KENDALL, TREMAINE,
BOOTH & HIGGINS
520 S.W. Sixth Avenue
Portland, Oregon 97204

JOHN H. PICKERING
TIMOTHY B. DYK
WILMER, CUTLER & PICKERING
900 17th Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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PETITIONER'S REPLY BRIEF

Respondents' brief seems basically designed to reargue this Court's decision in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). Their apparent position is that under the Constitution the rights of shopping center owners must in almost all cases be subordinated to the rights of individuals desiring to engage in speech activity. This Court in *Logan Valley*, however, declined to adopt this extreme position, recognizing that both shopping center owners and those desiring to engage in speech activity had important rights at stake.[1] After balancing these competing interests, the Court determined that there was a right of

[1] As this Court recently noted in *Lynch* v. *Household Finance Corp.*, 40 U.S.L.W. 4335, 4339-40 (March 23, 1972), there is no "dichotomy between personal liberties and property rights." Rather, "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."

access to shopping centers for picketing and handbilling activities where (1) these activities were directly related to one of the businesses being conducted on the shopping center premises and (2) the shopping center premises and adjacent public areas were arranged in such a way that, as a practical matter, it was necessary to use privately-owned areas for the picketing and handbilling in order to reach customers of the business which was the subject of criticism.

In our opening brief, we suggested that *Logan Valley* went as far as was appropriate and necessary to protect the First Amendment interests of those seeking access to shopping center premises and that *Logan Valley* should not be extended to cover activities unrelated to shopping center business or activities which could be conducted in public areas abutting and adjacent to the shopping center premises. We pointed out that Respondents' handbills in this case were entirely unrelated to the business of Lloyd Center or any of its tenants. We also pointed out that there was no lack of public areas in and around Lloyd Center where Respondents could distribute their antidraft handbills, and urged that Petitioner's policy of requiring handbilling to be conducted on the public areas in Lloyd Center was a proper regulation of the place of handbilling. We concluded that each of these separate and alternative grounds required reversal of the judgment below.

Respondents largely ignore these issues. They seem to assume that if they can establish that Lloyd Center is the "functional equivalent of a public business district" the decision below is correct and should be affirmed under the *Logan Valley* decision.

Initially, we note that Respondents' basic factual premise of functional equivalence is open to serious question, even though it was adopted by the District Court. As we have discussed in our opening brief, pages 18-19, the

shopping center mall portion of Lloyd Center is not open to the general public, and in general the invitation to enter the mall area is extended only to those desiring to come to the premises for business purposes. Moreover, here, unlike the situation in *Logan Valley*, there are no roadways or vehicular traffic in the interior areas where Respondents sought to distribute their handbills. Automobiles are entirely separated from the shopping area.[2] This situation is to be contrasted with that in *Logan Valley* where picketing and handbilling in a private roadway were involved, and the Court pointed out that

> "the roadways provided for vehicular movement *within the mall* and the sidewalks leading *from building to building*, are the functional equivalent of streets and sidewalks of a normal municipal business district." 391 U.S. at 319. (Italics added.)

Respondents suggest, however, that Lloyd Center is the functional equivalent of a public business district because certain public streets and sidewalks were vacated to enable Petitioner to construct its shopping center premises. Brief pp. 19-20. Without saying so explicitly, Respondents appear to suggest that the walkways in the shopping mall, where they sought to distribute handbills, occupy what at one time were public streets and sidewalks. In fact, this is not the case. These walkways do not parallel former public streets and sidewalks, and the areas that were public streets and sidewalks are now occupied by buildings and parking lots in the shopping center. *Compare* Ex. 27 (color diagram not reproduced in the Appendix) *with* Exs. 4-5, A. 116-17. And, when Lloyd Center was constructed, land of equal area was dedicated to the widening of existing public streets and sidewalks or the construction of new public streets and sidewalks which are now available for Respondents' handbilling activities.

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[2] Merchandise is delivered on the roof and parking is outside and in the basement.

In any event, a shopping center owner's rights are surely not diminished because the center was constructed on previously platted land rather than in an unplatted area.

Moreover, even if the Lloyd Center mall were the "functional equivalent of a public business district," this would be only the beginning of the analysis rather than the end, since *Logan Valley* itself makes clear that a finding of functional equivalence is in no way dispositive of the questions presented here. Rather, such a finding leads to the questions specifically reserved by the Court in *Logan Valley* and discussed in our opening brief, namely whether a shopping center must afford access for unrelated handbilling, and whether handbilling must be allowed if adjacent public areas are available for that purpose.

As we now discuss, Respondents' brief addresses these central issues only indirectly.

I. Respondents Have Failed To Demonstrate Either a Factual or a Legal Justification for Extending *Logan Valley* to Unrelated Handbilling

In their brief, Respondents assert that under *Logan Valley* no distinction should be made between handbilling which is related to the use of shopping center premises and that which is unrelated. Brief pp. 11, 27. As we have discussed in our opening brief, page 21, in the experience of Lloyd Center handbilling is distracting and substantially detrimental to business. However, relying on numerous newspaper and magazine articles relating to the growth of shopping centers—which are not part of the record in this Court—Respondents argue that if shopping center owners were permitted to prohibit unrelated speech activities, the public's need for information would be unduly restricted. Respondents claim too much in this respect. Despite the growth of shopping centers in the United States, massive public areas are available, and will remain available, for speech activities. More-

over, it seems likely that coincident with the growth of shopping centers there has been a comparable growth in public streets and other areas available for handbilling activities. In the City of Portland alone there are literally thousands of linear blocks of public sidewalks including the 66 which are within Lloyd Center, as well as numerous additional public areas like Holladay Park in Lloyd Center, which Respondents admit were available to them for handbilling.

Respondents also erroneously suggest that *Logan Valley* adopted the reasoning which they suggest, and that its basic rationale is that the rights of a shopping center owner must be subordinated to the public's need for information. Respondents assert that this rationale applies equally to related and unrelated speech activities. But *Logan Valley* does not rest upon this ground.[3] Rather, the *Logan Valley* opinion justified the invasion of shopping center owners' property rights in order to prevent businesses in shopping centers from immunizing themselves from criticism "by creating a *cordon sanitaire* of parking lots around their stores." 391 U.S. at 325.[4] This

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[3] On page 17 of their brief, Respondents incorrectly say that *Marsh* v. *Alabama*, 326 U.S. 501 (1946), was extended to shopping centers in *Logan Valley*. That is a superficial misinterpretation that the Court sought to avoid with the language in footnote 9 and elsewhere in the opinion, expressly limiting the decision to speech activities that were related to the owner's use of the land.

[4] At page 21 of their brief, referring to the *Logan Valley* decision Respondents say that "freedom of communication would be restricted in direct proportion to the continued growth of private shopping centers," and follow this with a quotation from *Logan Valley* (391 U.S. at 324) stated to be in context therewith. Reference to the *Logan Valley* opinion shows, however, that the quotation cited by Respondents with reference to economic development of shopping centers in the United States over the last twenty years was intended as an illustration to the paragraph immediately following it which discusses only the need to permit related handbilling. That paragraph reads

> "These figures illustrate the substantial consequences for workers seeking to challenge substandard working conditions,

reasoning, of course, has no application whatever to unrelated speech activities. Indeed, the express rationale and purpose of *Logan Valley* illustrates the importance —actually the necessity—of the element of a special relationship between the particular message distributed and the owner's use of the land.

Finally, Respondents in this Court appear to urge a ground for affirmance which was not adopted by the courts below, namely, that Petitioner cannot bar Respondents' unrelated handbilling activities from its premises because it engaged in general promotional and related activities for the purpose of furthering the business of the center. Brief pp. 34-39. In this connection, Respondents rely on several cases which have held that discrimination is unconstitutional at places that are owned, financed or controlled by the government. These cases are inapplicable here. Respondents cite only two—neither of which was decided by this Court—that involved a claimed right of access for speech activities. *Wolin* v. *Port of New York Authority*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967). Neither case is pertinent here because, in both, the property involved was owned by the government.[5] The mall area of

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consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a contrary decision here would have. Business enterprises located in downtown areas would be subject to on-the-spot public criticism for their practices, but businesses situated in the suburbs could largely immunize themselves from similar criticism by creating a *cordon sanitaire* of parking lots around their stores. Neither precedent nor policy compels a result so at variance with the goal of free expression and communication that is the heart of the First Amendment." *Id.* at 324-25.

[5] The other cases cited, like *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Evans* v. *Newton*, 382 U.S. 296 (1966), all involved racial and related forms of discrimination. Moreover, like *Wolin* and *Kissinger*, they involved property owned or operated by the public and thus have no application here.

Lloyd Center is a private shopping center complex, not a transit system or bus terminal owned by the government, and the rights of a private business involved must be weighed in the balance.

Petitioner is not a public body and is not an eleemosynary association. Petitioner invites and permits people to come on its premises. It urged them to do so. It creates situations to cause them to come. It treats them well while they are there, and wants them to stay and to come back. But Petitioner does so for business purposes and as a merchandiser only. The record in this case is clear that in deciding whether to allow persons to come onto the mall area for solicitation or other activities, Petitioner was exercising a normal business judgment. *See* A. 51-59, 71, 93-95. Petitioner's president stated the essence of its policy on such activities as follows:

> "I think our position has been to exclude them. There have been a few exceptions made because we felt they were good for the center; they would bring people there and it was customer motivation." A. 95.

Contrary to Respondents' suggestion, Petitioner has not discriminated among handbillers on the ground that it approves or disapproves of the content of the particular speech involved. In the area of handbilling Petitioner made no exceptions to its uniform rule prohibiting all handbilling—whether commercial or non-commercial and whether conducted by a tenant of the center or an outsider.[6]

Under these circumstances, we suggest, it is plain that neither the *Wolin* nor the *Kissinger* decision has anything whatever to do with this case, and this Court

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[6] As noted in our opening brief, page 5, an exception was made, subsequent to *Logan Valley*, for related handbilling.

should hold that Petitioner may permissibly bar unrelated handbilling from its premises.

II. Respondents Concede That Shopping Center Property Need Not Be Made Available for Handbilling Activities If Alternative Public Areas Are Available. Respondents Have Made No Showing Here That the Alternative Public Areas at Lloyd Center Were Inadequate for Handbill Distribution

In our opening brief, we urged an alternative ground for reversal of the judgment below, namely that the record in this case demonstrates that, unlike the situation in *Logan Valley*, there were substantial public areas adjacent to Petitioner's shopping center buildings which were available for Respondents' handbilling activities. In their brief, Respondents virtually concede that where alternative areas are available for handbilling, that activity may be banned from shopping center premises. Thus, on page 35 of their brief, Respondents state:

> "It may be that First Amendment guarantees do not extend to private property open to and used by the general public in certain peculiar and limited circumstances. *Where all who enter a store or other particular private property may be as effectively reached by communication of the message on nearby public sidewalks, there is no need for exercise of the expression on private property.*" (Italics added.)

Having made this concession, Respondents could have been expected to demonstrate why the mall at Lloyd Center was the only place in the shopping center area where they could effectively distribute their message. There is no such demonstration in Respondents' brief or in the record of this case.

Respondents do suggest that handbill distribution would be dangerous in public areas adjacent to Lloyd Center.

Although the District Court stated that handbilling in these areas would "perhaps" be hazardous, there is no evidence in the record on this issue,[7] and we note that these public areas were selected by Respondents for their handbilling activities after they were asked to leave the interior mall area.

Respondents also seem to argue that the District Court found that use of Petitioner's property was necessary for the effective distribution of Respondents' message. In fact, the District Court carefully refrained from finding that Respondents' handbills could not be effectively distributed from the public streets and sidewalks. Rather, the court found only that handbills could not be distributed "as effectively" in the public areas as they could in the mall. Pet. App. 11a. This hardly constitutes a finding that it was necessary for Respondents to be allowed to invade the private property of Petitioner in order to give them a reasonable opportunity to express their ideas. As the Court said in *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966), there is no constitutional right to propagandize "whenever and however and wherever" one pleases.

Finally, in an effort to avoid the critical gap in their case, Respondents for the first time in this Court make the remarkable contention that Petitioner had the burden of proof on this issue and that Petitioner failed to establish that Respondents could effectively distribute their handbills in the public areas adjacent to Lloyd Cen-

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[7] Clearly with respect to those who come to the shopping center by foot or bus, no such hazards exist. Respondents suggest that handbillers could not distribute their leaflets from the driver's side of the two-lane entrances and exits to the center's parking areas without disrupting traffic and possibly endangering themselves. Brief p. 31. No such evidence exists in the record. Moreover, Respondents suggest no reason why they could not distribute their handbills on the passenger side of vehicles at the time they stop at the parking lot exits.

ter. In fact, the record clearly shows that such publicly-owned areas were available. As discussed in Petitioner's initial brief, there are fully 66 linear blocks of public sidewalks in Lloyd Center itself available for Respondents' handbilling, and Respondents had the opportunity to reach all of the Lloyd Center customers as they entered or departed the mall area. In any event, Respondents were plaintiffs in this case below and had the burden of proving their case. They cannot shift this burden to Petitioner. This clearly is not a case in which the defendant is more likely than the plaintiff to have the information on which the issue may be decided, and no other reason is suggested for reallocating the traditional burden of proof to the defendant in the court below.

CONCLUSION

For the reasons stated here and in Petitioner's opening brief, the judgment below should be reversed.

Respectfully submitted,

GEORGE BLACK, JR.
ROBERT J. MILLER
BLACK, KENDALL, TREMAINE,
BOOTH & HIGGINS
520 S.W. Sixth Avenue
Portland, Oregon 97204

JOHN H. PICKERING
TIMOTHY B. DYK
WILMER, CUTLER & PICKERING
900 17th Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner

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